IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AND THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES AS AMICI CURIAE IN SUPPORT OF NONFEDERAL RESPONDENTS

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INTEREST OF *AMICI*

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States (rev. 1971), the American Council on Education and the Association of American Medical Colleges respectfully submit this brief accompanied by written consent of all parties to their participation as *amici curiae* in No. 77-926.

The American Council on Education is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council is a membership organization composed of 1,291 nonprofit institutions of higher education from both the public and private sectors and 169 educational associations and organizations. Its work is financed by membership dues, by grants from foundations and learned and professional societies, and by grants from and contracts with the Federal government.

The Council is the nation's major coordinating body in postsecondary education. As an organization whose members include the overwhelming majority of nonprofit four-year colleges and universities, it is uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

It is especially appropriate that the Council participate as *amicus curiae* in the instant case because the federal statute at issue (Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*) applies only to *educational* programs and activities receiving Federal financial assistance.[1] Thus the Council's mem-

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[1] Title IX is distinguishable from three other federal civil rights statutes (Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Age Discrimination Act of 1975, 42 U.S.C. §§1601 *et seq.*) in that the latter encompass all programs and activities receiving Federal financial assistance.

ber institutions operate a substantial portion[2] of the programs and activities that will be affected by the Court's ruling on the important question presented in this case.

The Association of American Medical Colleges is a nonprofit corporation organized under the laws of the State of Illinois and having its principal place of business in the District of Columbia. Founded in 1876, the Association is a membership organization composed of all 124 accredited and operating nonprofit medical schools in the United States, over 400 teaching hospitals in which undergraduate medical education is conducted, and 63 academic and professional societies, the members of which are actively engaged in medical education, biomedical research and the provision of patient care. Its corporate purpose, the advancement of medical education, is financed by membership dues and through grants and contracts provided by foundations and the Federal government.

The University of Chicago Pritzker School of Medicine and the Northwestern University Medical School are institutional members of the Association. The question presented for resolution in this case has profound implications for the Association's member institutions, in no small measure because medical education in this country is distinguished from nearly all other educational endeavors by the gap that exists between its enormous attractiveness to applicants and the limited number of places available to accommodate them.

QUESTION PRESENTED

The sole question presented in this case is whether

[2] There were 20,318 school districts and institutions of higher education told by the Department of Health, Education, and Welfare to file assurances of compliance with Title IX by September 30, 1976. *Implied Rights of Action to Enforce Civil Rights*, 87 YALE L.J. 1378, n. 165 (1978).

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, impliedly creates a private right of action, enabling individual claimants to bring civil actions under the statute against school districts and institutions of higher education which receive Federal financial assistance.

ARGUMENT

I. UNDER THE TESTS OF *CORT V. ASH*, NO PRIVATE RIGHT OF ACTION SHOULD BE IMPLIED UNDER TITLE IX.

Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681, reads in relevant part as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

The subsequent two sections establish a comprehensive statutory scheme for federal administrative enforcement of section 901's mandate of nondiscrimination. That scheme requires that, before the single sanction of funds cutoff can be applied, federal agencies and departments must seek voluntary compliance with the nondiscrimination directive and must afford recipients an opportunity for hearing. After a final determination with respect to compliance has been made by an agency or department, judicial review of that determination is expressly authorized.

Despite the detailed consideration given to the question of remedies in Title IX, the statute does not expressly confer upon private citizens the right to bring a civil action in federal court to enforce the statute. Therefore, in determining whether or not such a right should be implied, the court below properly applied

the standards that have been developed by this Court in a long line of cases.[3] Those standards were enunciated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), as follows:

> First, is the plaintiff "one of the class for whose especial benefit the statute was created,"—that is, does the statute create a Federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a right or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law? [citations omitted].

In this case there is no question that the female plaintiff is a member of the class for whose benefit the statute was enacted. In fact, section 901 itself includes a provision specifically stating that "*. . . in regard to admissions to educational institutions, this section shall apply* only *to institutions of* vocational education, *professional education,* and graduate higher education, and to public institutions of undergraduate higher education." [emphasis added].

There is also little doubt that the fourth test (whether or not the cause of action is one traditionally relegated to state law) is met in this case, since civil rights legislation has in recent decades been an area of federal initiative.

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[3] *Cort v. Ash*, 422 U.S. 66 (1975) (refusing to imply a private right of action by a shareholder under 18 U.S.C. § 610, forbidding corporate contributions to presidential campaigns); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (refusing to imply a private right of action by an investor under the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa *et seq.*); and *National Railroad Passenger Corp. [Amtrak] v. National Association of Railroad Passengers*, 414 U.S. 453 (1974) (refusing to imply a private right of action to enforce the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501 *et seq.*).

A private right of action should not be implied under Title IX, however, because neither of the two remaining tests set forth in *Cort v. Ash* is met: there is no indication of legislative intent to create such a right, and it is inconsistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.

A. *There is no indication of legislative intent, explicit or implicit, to create a private right of action under Title IX.*

The briefs of the parties and the reported opinions of the court below in this case have dealt extensively with the legislative histories of Title IX and of other statutes which have been said to cast light on Congress' intent in enacting Title IX.[4] *Amici*, therefore, will not recount those histories here.

As is conceded by the *amicus* brief of the Lawyers' Committee for Civil Rights under Law,[5] the truth of the matter is that neither Title IX nor its legislative history addresses the question of private enforcement. This fact should be dispositive of the issue under the "legislative intent" test of *Cort v. Ash*. In *Cort*, legislative silence was taken as an indication that no private right should be implied under the campaign contributions statute at issue in that case. And, in his separate opinion in *University of California Regents v. Bakke*, ___ U.S. __

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[4] The court below granted a rehearing of this case in order to determine the effect of the inclusion of Title IX within the provisions of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Reference has also been made to a statement concerning Title IX in the legislative history of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* Summary of the Committee Substitute [Amendment of Section 504], 120 CONG. REC. 30534 (1974), discussed in *Implied Rights of Action, supra*, n. 148.

[5] "The legislative history of Title IX contains no expression of support for or opposition to private rights of action . . ." Brief, p. 8.

—, No. 76-811 (decided June 28, 1978), Justice White gave weight to the legislative silence with respect to private enforcement of Title VI of the Civil Rights Act of 1964:

> But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles of the Act, intended silently to create a private cause of action to enforce Title VI. (slip op. at 3).

The court below likewise found the legislative history of Title IX silent and properly followed established precedent in interpreting the legislative silence as supporting its conclusion that no private right of action exists. 559 F. 2d 1077, 1081-1082 (1977).

Moreover, an examination of recent legislative action amending another, similarly structured, civil rights statute demonstrates that Congress is well aware of the enforcement issue and that it could have amended Title IX expressly to create a private right of action had that been its intention.

The Age Discrimination Act of 1975, 42 U.S.C. §§ 1601 *et seq.*, prohibits discrimination on the basis of age in federally-assisted programs and activities. The Act's operative section (§ 303, 42 U.S.C. § 6103) is worded similarly to that of Title IX:

> No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In its original form, the Act dealt with the enforcement question by stating, "The provisions of this section shall be the exclusive remedy for the enforcement of the provisions of this title." § 305(e), 42 U.S.C. § 6105(e). In 1978, however, Congress voted to delete § 305(e) and to substitute two new subsections ex-

pressly recognizing a private right of action.[6] The report of the Committee on Education and Labor, in a section entitled "Private Right of Action to Enforce Act," stated that it was the purpose of the House's version of the new provision "to provide that any interested person may bring an action in an appropriate district court of the United States to enjoin any violation of such act by any program or activity receiving Federal financial assistance." H.R. REP. NO. 1150, 95th Cong., 2d Sess. 40 (1978). The Senate version of the bill did not address this issue, S. REP. NO. 855, 95th Cong., 2d Sess. (1978), and the conference agreement accepted the House

[6] (e)(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this Act by any program or activity receiving Federal financial assistance, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health, Education, and Welfare, the Attorney General of the United States, and the person against whom the action is directed. Such interested person may elect, by demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff.

(2) The notice referred to in paragraph (1) shall state the nature of the alleged violation, the relief to be requested, the court in which the action will be brought, and whether or not attorney's fees are being demanded in the event that the plaintiff prevails. No action described in paragraph (1) shall be brought (A) if at the time the action is brought the same alleged violation by the same defendant is the subject of a pending action in any court of the United States; or (B) if administrative remedies have not been exhausted.

(f) With respect to actions brought for relief based on an alleged violation of the provisions of this title, administrative remedies shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first. [Reprinted in Conference Report, H.R. REP. No. 1618, 95th Cong., 2d Sess. 47 (1978).]

version, with certain modifications. *See* Conference Report, H.R. REP. NO. 1618, 95th Cong., 2d Sess. 87 (1978).

Thus, Congress in 1978 demonstrated its awareness of the issues surrounding the authorization of a private right of action under a civil rights statute enacted some years previously, and it resolved the question through appropriate statutory language. In view of this renewed legislative attention to the general issue, there is no need for this Court, under the rubric of ascertaining the original legislative intent, to imply a right which was not contemplated by Congress in 1972. Rather, sound public policy requires that the matter be resolved in the legislative arena through the normal political process.

B. *Implication of a private right of action under Title IX would be inconsistent with the underlying purposes of the legislative scheme.*

A second test set forth in *Cort v. Ash, supra,* and not met with respect to Title IX is whether implication of a private right of action would be consistent with the underlying purposes of the legislative scheme. Title IX contains an elaborate scheme for administrative enforcement which includes required voluntary compliance efforts, an opportunity for hearing, and other procedural restrictions. Regarding Title VI of the Civil Rights Act of 1964, after which Title IX was modelled, Justice White stated in his separate opinion in *University of California Regents v. Bakke, supra:*

> If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves. (slip op. at 4-5).

It is likewise inconceivable that Congress intended to permit individuals to circumvent the administrative prerequisites of Title IX.

In addition to the administrative remedies set forth in Title IX, due regard should also be given to other statutes in the overall legislative scheme to ensure that individuals are not subjected to discrimination on the basis of sex. Institutions of higher education are covered by Title IX, in their capacity as recipients of Federal financial assistance; by Executive Order 11246, 3 C.F.R. 339-48 (1964-comp.), *as amended by* Executive Order 11375, 32 Fed. Reg. 14,303 (1967), in their capacity as contractors with the federal government; and by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206, in their capacity as employers. In view of these four separate federal mandates of nondiscrimination on the basis of sex, remedies should not be expanded beyond those expressly provided by any one mandate, in the absence of compelling justification.

That there is no such justification becomes quite apparent through an examination of the interplay of Title IX and Title VII. Title VII is the major federal statute requiring nondiscrimination on the basis of sex by employers. Although Title IX was intended to prohibit discrimination on the basis of sex among beneficiaries of federally-assisted educational programs and activities, the regulations promulgated thereunder include several sections dealing with employment practices. 45 C.F.R. §§ 86.51-86.61. Notwithstanding the fact that every court that has considered the question has held those sections invalid,[7] the Department of

[7] *Romeo Community Schools v. HEW,* 438 F. Supp. 1021 (E.D. Mich., April 7, 1977); *Seattle University v. HEW,* 16 EPD ¶ 8241 (W.D. Wash., Jan. 3, 1978); *McCarthy v. Burkholder,* 17 EPD ¶ 8454 (D. Kan., Feb. 2, 1978); and *Brunswick School Board v. Califano,* 16 EPD ¶ 8242 (D. Me., April 13, 1978).

Health, Education and Welfare is continuing to enforce them in jurisdictions not subject to an injunction, pending the outcome of appeals in each case.

If the employment sections of the regulations are upheld, and if a private right of action is implied under Title IX, the anomalous result will be that employers which are school districts or institutions of higher education will be more vulnerable to lawsuits alleging sex discrimination than other employers which are subject only to Title VII. (Under Title VII, 42 U.S.C. § 2000e-5(f)(1), individual complainants must file an administrative complaint with the Equal Employment Opportunity Commission and, after passage of a set time, receive a "right-to-sue" letter before bringing a civil action in federal district court.) There is no evidence in the legislative history of either statute to indicate that Congress intended to render educational employers more exposed to spontaneous litigation for the resolution of grievances than other employers in the public and private sectors.

If, on the other hand, the employment sections are not upheld, and if a private right of action is implied under Title IX, an even more anomalous result would obtain in that individuals protected by Title IX (principally students and applicants for admission) would have readier access to the courts than individuals protected by Title VII (employees). For the reasons outlined in Part II of this brief, it is highly unlikely that Congress intended such a result.

Both of these anomalies can be avoided by declining to imply a private right of action under Title IX, thus leaving the legislative scheme established by Congress intact as the sole means of enforcing rights granted by the statute.

II. In a Decision Whether to Imply a Private Right of Action Under Title IX, Weight Should Be Given to the Countervailing Constitutional Interest in Academic Freedom.

To the extent that this Court looks outside Title IX and its legislative history for guidance in determining whether to imply a private right of action under Title IX, the well-established constitutional interest in academic freedom should not be overlooked. "Academic freedom" in the traditional sense has been defined[8] as follows:

> Academic freedom is the freedom of the teacher within his or her field of study. It is a safeguard that allows researchers and teachers in institutions of higher learning to pursue their work without the inhibition, prohibition, or direction of political, ecclesiastical, or other administrative authorities, regardless of their personal philosophies, behavior, or life-style. It is a liberty granted to these individuals to assure them the opportunity for examination and challenge of doctrines, dogma, and received opinions in the interest of advancing knowledge for the benefit of all society.

Academic freedom has long been a major tenet of our American democratic faith. It, like other such tenets, is embedded in our constitutional law. Academic freedom has been construed to encompass a variety of elements: freedom to provide instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); freedom to express unpopular political beliefs in the classroom (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); freedom to refuse to take a loyalty oath (*Keyishian v. Board of Regents*, 385 U.S. 589 (1966)); freedom to teach religiously unorthodox scientific theories (*Epperson v. Arkansas*, 393 U.S. 97 (1968)); and freedom of

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[8] "Academic Freedom," entry in Knowles, ed., *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24.

students to organize an education-related extracurricular activity (*Healy v. James*, 408 U.S. 169 (1972)).

Academic freedom in its purest sense must be grounded in the freedom of academic institutions to fulfill their missions of teaching, research and service in an environment free of governmental interference with matters of educational policy. Justice Frankfurter acknowledged this necessity when he described "the four essential freedoms" of a university as "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire, supra,* at 263.

In its recently completed term, this Court decided two cases, both involving medical schools, which reaffirm the constitutional interest in academic freedom under the First Amendment and the due process clause of the Fourteenth Amendment. In *Board of Curators of the University of Missouri v. Horowitz,* ___ U.S. ___ No. 76-695 (decided March 1, 1978), the due process clause was held not to require a formal hearing in cases of dismissal on academic grounds. And, in *University of California Regents v. Bakke, supra,* Justice Powell, in finding the attainment of a diverse student body a constitutionally permissible goal under the equal protection clause, looked to the First Amendment's well-established concern for academic freedom. The Court's discussions in those cases of the appropriateness of judicial deference to educators on educational matters are of direct relevance to the question presented in the instant case.

In *Horowitz,* a student in her final year of medical school at a state university was dismissed for failure to meet required academic standards with respect to clinical practice. She brought suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging that the school's failure to grant her a hearing prior to her

dismissal violated her rights under the due process clause of the Fourteenth Amendment. In holding that a formal hearing was not required under the circumstances of the case, the Court distinguished between dismissals for discriplinary cause, *Goss v. Lopez,* 419 U.S. 565 (1975), and dismissals for academic cause:

> The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions present in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, *the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.* [emphasis added]. (slip op. at 11).

In his concurring opinion, Justice Powell made a similar point: "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." (slip op. at n. 6).

Amici submit that academic judgments concerning admission, evaluation, and dismissal are ideally within the sole purview of university faculties. Nevertheless, it is recognized that an individual's civil rights (including the right to be free of discrimination on the basis of sex) are of a dignity to require that academic decisions affecting those rights be reviewable. Such review, however, must be limited to assuring that decisions are based on academic considerations, and not on capricious, academically irrelevant, or morally and legally reprehensible grounds. This limited constraint on academic autonomy can be effected least intrusively and least dangerously by entrusting enforcement of the law to an administrative agency which has expertise in

educational matters, with a mandate that efforts to achieve voluntary compliance precede any formal enforcement proceedings. This is precisely what Congress has done in establishing the enforcement scheme for Title IX, which should not now be supplemented by private civil actions.

In warning against "judicial intrusion into academic decisionmaking," the majority opinion in *Horowitz* stated, "Courts are particularly ill-equipped to evaluate academic performance. . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship." (slip op. at 12-13). Since Title IX was primarily, if not exclusively,[9] intended to ensure nondiscrimination on the basis of sex among beneficiaries of federally-assisted educational programs and activities, students and applicants for admission are the principal parties protected by the statute. If a private right of action is implied under Title IX, many of the cases which will have to be decided by the federal courts will involve academic evaluations.[10] This would portend precisely the situation the Court was seeking to avoid in *Horowitz*.

Even closer to the facts of the instant case is

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[9] Whether or not Title IX covers the employment practices of educational institutions is currently disputed. See discussion above at pp. 9-10 and n. 7.

[10] Such an action is already in progress in *Alexander v. Yale University*, Civil No. 77-277 (D. Conn.), where a female student claims that the university refused to act on her complaint that a low mark in her major field of study resulted from her rejection of the course instructor's sexual advances. Following denial of the university's initial motion to dismiss, plaintiff's ensuing application for a temporary injunction went off the court's calendar without formal hearing when the parties agreed to the university's dispatching letters to law schools to which plaintiff had applied advising that the validity of the political science grade in question was being contested in a lawsuit. *See* Rulings of U.S. Magistrate dated Dec. 21, 1977 and June 30, 1978.

University of California Regents v. Bakke, supra, which was an action brought by an unsuccessful applicant to a state university medical school who alleged that he had been the victim of discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. In finding that the attainment of a diverse student body is a constitutionally permissible goal under the equal protection clause, Justice Powell looked to the First Amendment's concern for academic freedom:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. (slip op. at 42).

Justice Powell went on to state that, although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. And, in *Bakke*, the university's medical school admissions system was found to have exceeded those constitutional limitations.

In the present case, statutory rather than constitutional limitations protecting individual rights may not be disregarded. *Amici* are not urging that statutory limitations be disregarded, but rather that, in defining and interpreting those limitations, the Court be mindful of the countervailing constitutional interest in the integrity of the academic enterprise.

III. Broad Policy Considerations Do Not Favor Implication of a Private Right of Action Under Title IX.

If this Court finds it necessary to look beyond Title IX, its legislative history, the legislative histories of related statutes, and constitutional principles in order to

decide whether a private right of action should be implied under Title IX, broad considerations of public policy require that no such right be implied.

A. *Private actions would result in differing, and possibly inconsistent, interpretations of Title IX and the regulations promulgated thereunder.*

Title IX's operative section consists of a single sentence mandating nondiscrimination on the basis of sex in federally-assisted educational programs and activities, with certain delineated exceptions. 20 U.S.C. § 1681(a). Regulations promulgated under Title IX comprise eight pages of fine print in the Code of Federal Regulations, 45 C.F.R. §§ 86.1-86.71, and cover all aspects of a university's operations, including admissions, financial aid, housing, athletic programs, and employment. Enforcement of the regulations has been entrusted to the Department of Health, Education and Welfare's Office for Civil Rights (OCR).

The Title IX regulations do not contain rigid formulas as to what constitutes compliance. Rather, they are imbued with the notion of reasonableness throughout. For example, in the troublesome area of intercollegiate athletics, any institution offering athletic scholarships "must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics." 45 C.F.R. § 86.37(c)(1). HEW has interpreted this provision as meaning that "neither quotas nor fixed percentages of any type are required . . . [T]he institution is required to take a reasonable approach in its award of athletic scholarships, considering the participation and relative interests and athletic proficiency of its students of both sexes."[11] By taking such an ap-

[11] Office for Civil Rights, Department of Health, Education and Welfare, Memorandum on Elimination of Sex Discrimination in Athletic Programs (Sept. 1975).

proach, HEW is able to maintain substantial discretion and flexibility in enforcing Title IX.[12] If, however, a private right of action is implied, and individual complainants are permitted to by-pass OCR's administrative enforcement procedures, differing views of what is "reasonable" can be expected, and there will be little hope for that uniformity of interpretation which all agree is desirable.

B. *The Department of Health, Education and Welfare has greater expertise in handling complex educational matters than the federal judiciary.*

In the instant case, petitioner was one of 5,427 persons who applied for the 104 positions available in the 1975 entering class at The University of Chicago Pritzker School of Medicine. As was amply demonstrated to this Court in the numerous *amicus* briefs filed in the case of *University of California Regents v. Bakke, supra,* the admissions process in medical education and in higher education generally is a complex and highly sophisticated process. *Amici* believe that any policing of that process necessary to ensure equal educational opportunity can best be performed by an executive department staffed with experienced professionals who are familiar with the operation of institutions of higher education. The court below correctly noted this underlying rationale for the doctrine of primary jurisdiction and concluded: "In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition, HEW has the benefit of comparing the local practice to the admission policies on a national level." 559 F. 2d 1063 at n. 17.

[12] See Comment, *Sex Discrimination in Athletics,* 29 ALA. L. REV. 390, 411 (1978) and Cox, *Intercollegiate Athletics and Title IX,* 46 G.W. L. REV. 34, 49 (1977).

Declining to imply a private right of action couples the advantage of relying on HEW's greater expertise in educational matters with the concomitant and not inconsequential benefit of conserving the resources and energy of the judiciary. As the court below stated, "Considering our already overburdened system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate." 559 F. 2d 1063, 1075.

C. *Excessive litigation would constitute a drain on the resources of hard-pressed colleges and universities.*

Amici in support of petitioner urge that, because HEW's Office for Civil Rights has been unable to keep current in its processing of Title IX complaints, a private right of action should be implied to enable individual complainants to sue educational institutions which allegedly have not complied with the Title IX regulations. Failure of a governmental agency to carry out its charge, however, should be of no relevance in ascertaining whether Congress intended for colleges and universities to be subject to civil actions brought by private individuals to enforce Title IX.[13]

Implication of a private right of action under Title IX could result in a host of new lawsuits against colleges and universities under three federal civil rights

[13] Private individuals may avail themselves of the judicial review procedures set forth in Title IX in the event that they are dissatisfied with a final decision on their complaint by HEW. And, in the event that HEW has made no decision after passage of an undue length of time, such persons may seek injunctive relief against HEW in the federal district courts, as was done in *Women's Equity Action League v. Califano*, Civil Action No. 74-1720 (D.D.C., orders dated June 14, 1976 and October 26, 1977).

statutes.[14] Under such circumstances the potential for litigation over admissions decisions and academic evaluations would be virtually limitless.[15] The consequence could be a serious depletion of the resources of educational institutions, resources which might better be used in meeting educational objectives. As one university president recently wrote in the alumni magazine of the Massachusetts Institute of Technology:[16]

> Aside from the merits of any particular case, the overriding fact is clear that the hands of all administrators are increasingly tied by real or potential legal issues. I find I must consult our lawyers over even small, trivial decisions. The university has so many suits against it (40 at last count) that my mother now calls me, "My son, the defendant."
>
> The courts and the law are, of course, necessary to protect individual rights and to provide recourse for negligence, breach of contract, and fraud. But a "litigious society" presents consequences that nobody bargained for, not least the rising, visible expense of legal preparation plus the invisible costs of wasted time.

A private right of action should not be implied under Title IX in the absence of a Congressional finding that it is in the national interest for colleges and universities,

[14] Title IX of the Education Amendments of 1972; Title VI of the Civil Rights Act of 1964; and Section 504 of the Rehabilitation Act of 1973.

[15] For the academic year 1977-78 alone, 40,569 applicants submitted 371,545 applications (an average of 9.16 applications each) in competition for the 15,493 available first year places in 119 medical schools. *Datagram: Applicants for 1977-78 Medical School Class*, 53 J. MED. ED. 698 (August, 1978). Thus, 25,076 applicants were each rejected by an average of nine medical schools, creating a total of approximately 229,700 adverse decisions which would be directly reviewable by Federal courts.

[16] Bennis, *Where Have All the Leaders Gone?* 79 TECHNOLOGY REV. 5 (March/April, 1977).

especially those within the private sector,[17] to expend increasing shares of their limited resources for litigation costs.

[17] The briefs of the parties in this case give considerable attention to the different postures of public and private institutions that would result if no private right of action is implied under Title IX. Public institutions could be sued under 42 U.S.C. § 1983 for violation of rights secured by law, presumably including Title IX. Private institutions, on the other hand, would not be subject to civil actions alleging violation of Title IX. In *Alexander v. Yale University, supra,* a federal magistrate noted this disparity: ". . . it could hardly be a principled distinction that one student would be at Yale and another at the University of Connecticut; if the state college student can secure judicial relief under § 1983, the more reason to imply a suit right [sic] for the identically situated private university student . . ." (slip op. at 9, Dec. 21, 1977).

Amici find such an argument unstudied, since it fails to take into account the multitude of ways in which the legal status of public and private colleges differ. In fact, such a distinction can be found in Title IX itself. (20 U.S.C. § 1681(a)(1) provides that, with respect to admissions at institutions of undergraduate higher education, only public institutions are covered). There are dramatic differences in the Fourteenth Amendment due process rights to which students are entitled, depending upon whether they attend public or private institutions. *See* O'Neil, *Private Universities and Public Law,* 19 BUFFALO L. REV. 155 (1970), and Hendrickson, *"State Action" and Private Higher Educatian,* 2 J. OF LAW AND EDUC. 53 (1973). Courts have been steadfast in preserving the "state action" requirement of 42 U.S.C. § 1983. *Cohen v. I.I.T.,* 524 F. 2d 818 (7th Cir. 1975); *Greco v. Orange Memorial Hospital,* 513 F. 2d 873 (5th Cir., 1975); and *Blackburn v. Fisk University,* 443 F. 2d 121 (6th Cir. 1971). And several federal statutes cover one sector but not the other, such as the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (covers only private institutions) and the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C. §§;201 *et seq.* (covers only private institutions).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the court below.

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